

*a***PUBLIC PROSECUTOR****v.****GUAN SHENG TRADING SDN. BHD.**

HIGH COURT MALAYA, JOHOR BAHRU

b

DATO' ABDUL MALIK ISHAK J

[CRIMINAL APPEAL NO: 41-84-1994]

10 JANUARY 1996

c

CUSTOMS & EXCISE: *Forfeiture - Proceedings under Customs Act 1967, s. 128(4) - Function of Magistrate - Whether offence against Act committed - Whether goods subject matter of offence - Whether conveyance was used in commission of offence.*

d

CUSTOMS & EXCISE: *Fraudulent evasion of duty - Customs Act 1967, s. 135(1)(g) - Whether offence committed - Burden of proof - Fraudulent intent - Intention to defraud government of duties or to evade prohibition - Elements of proving fraud - False representation - Dishonest conduct - Whether necessary to prove deceit on customs.*

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CUSTOMS & EXCISE: *Fraudulent evasion of duty - Nature and meaning of evasion - Whether evasion a continuing offence - Whether goods cease to be prohibited on being seized by customs - Concerned in evasion or attempted evasion - Definition of 'goods'.*

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CUSTOMS & EXCISE: *Burden of proof - Proceedings under Customs Act 1967, s. 128(4) - Whether presumption under s. 119 of Act can be invoked - Whether burden of proof shifted.*

g

CUSTOMS & EXCISE: *Forfeiture - Conveyance of prohibited goods - Seizure of vehicle used in conveyance - Whether forfeiture mandatory - Whether court has discretion - Customs Act 1967, s. 127(1) - Whether goods subject matter of or used in commission of offence - 'Notwithstanding that no person may have been convicted of such offence'.*

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EVIDENCE: *Adverse inference - Whether presumption arose against prosecution - Whether there was withholding of evidence - Whether mere failure to obtain evidence - Whether s. 114(g) of Evidence Act 1950 applicable.*

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This was an appeal by the Public Prosecutor against an order of the Magistrate's Court made pursuant to a hearing conducted under s. 128(4) of the Customs Act 1967 ('the Act'), releasing a lorry and a trailer to the respondent which was the owner. Although the summons in support of the proceedings under s. 128(4) of the Act specifically referred to an alleged offence under s. 135(1)(g) of the Act, no prosecution was instituted thereunder, and, the Magistrate also did not consider whether, on the available evidence, an offence would arise s. 135(1)(g) of the Act.

Held:

- [1] In proceedings pursuant to s. 128(4) of the Act, the function of the Magistrate is to examine the matter pertaining to the claim by the owner of the goods seized. In doing so, he has to satisfy himself that firstly, an offence against the Act has been committed, and secondly, either that the goods were the subject matter of the offence, or where the claim relates to the conveyance, that such conveyance was used in the commission of the offence. *a*
- [2] It is the duty of the prosecution to prove that the accused is concerned in fraudulent evasion. Once an intention to defraud the government of duties or to evade any prohibition is established, an offence under s. 135(1)(g) of the Act is said to have been committed. *b*
- [3] Goods which are prohibited do not cease to be so on their being seized by the customs, and the accused can be guilty of fraudulent evasion of prohibition on importation even if the prohibited goods imported by him have been substituted and he deals with them subsequently with the requisite fraudulent intention. *c*
- [4] The *actus reus* in the offence is being concerned in the evasion or the attempted evasion of a prohibition on the importation of the goods in question, not the successful evasion. Evasion is a continuing offence; it does not cease when the goods are seized by the authorities. Once imported, the evasion of the prohibition continues until the goods cease to be prohibited goods or, possibly, are re-exported. *d*
- [5] To prove fraud it must be shown that a false representation has been made knowingly; or without belief in its truth; or recklessly, careless whether it be true or false. *e*
- [6] Fraudulent evasion is established if the prosecution proves fraudulent conduct in the sense of dishonest conduct deliberately intended to evade the prohibition or restriction with respect to, or the duty chargeable on, the goods. There is no need to prove deceit on customs officials. *f*
- [7] In respect of proof in relation to proceedings under s. 128(4) of the Act, the Court may invoke any presumption of law provided under the Act; for example, by s. 128(5) of the Act, s. 119 of the Act shall apply in the determination of a matter pursuant to s. 128(4) of the Act. When s. 119 of the Act is applied, the burden of proof shall lie on the defendant. In the instant case, the respondent had failed to discharge the burden which shifted to it under s. 119 of the Act. *g*
- [8] The learned Magistrate, in an apparent oversight, had failed to take into account the existence of fraud on the available evidence. *h*
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- a** [9] The definition of the word 'goods' in s. 2(1) of the Act includes 'a conveyance of any kind in any circumstances.'
- [10] If a man wrongfully withholds evidence, every presumption to his disadvantage consistent with the facts admitted or proved will be adopted - *omnia praesumuntur contra spoliatores*. However, adverse inferences
- b** can only be drawn if there is a withholding of evidence, not merely on account of a failure to obtain evidence. Thus, s. 114(g) of the Evidence Act 1950 could not be applied in favour of the respondent in the present case.
- c** [11] Where a vehicle used in the commission of an offence is seized by the customs under s. 114 of the Act, and it is proved to the satisfaction of the Court that the vehicle was so used, s. 127 of the Act gives no discretion to the Court but renders an order for forfeiture mandatory. Under s. 127(1) of the Act, forfeiture is made mandatory so long as
- d** 'the goods were the subject matter of or were used in the commission of the offence.' The phrase 'notwithstanding that no person may have been convicted of such offence' in s. 127(1) of the Act makes forfeiture inevitable even if the accused is acquitted of the charge against him.
- e** [12] In the instant case, an offence against the Act had been committed. The goods were the subject matter of an offence under s. 135(1)(g) of the Act, and the lorry and trailer were used in the commission of the offence. Consequently, it was mandatory to forfeit both the lorry and the trailer.
- [Public Prosecutor's appeal allowed.]
- f** **Cases referred to:**
Keng Soon Finance Bhd. v. Pegawai Kanan Kastam, Johore Bahru [1981] 2 MLJ 249 (foll)
Loh Chak Wan v. Public Prosecutor [1939] 8 MLJ (FMSR) 84 (refd)
R v. Green (Harry Rodney) [1975] 3 All ER 1011 (foll)
Mohamed Taiyob v. Public Prosecutor [1947] 13 MLJ 101 (refd)
- g** *Derry v. Peek* [1889] 14 AC 337 (refd)
Attorney General's Reference (No. 1 of 1981) [1982] 2 All ER 417 (foll)
Public Prosecutor v. Chieng Ung Kai [1993] 1 MLJ 21 (not foll)
Lau Khing Chung v. Public Prosecutor [1993] 3 MLJ 295 (foll)
Ng Eng Kooi & Anor. v. Public Prosecutor [1970] 1 MLJ 267 FC (refd)
- h** *Rusell v. Ledsam* [1845] 14 N. & W. 574 (refd)
Lim Kim Chai v. Public Prosecutor [1963] 29 MLJ 26 (refd)
Yap Yoon Lin v. Regina [1954] 20 MLJ 59 (refd)
Reg v. Ng Hee Weng & Ors. [1956] 22 MLJ 85 (foll)
Sinjo Credit & Leasing Sdn. Bhd. v. Minister of Finance Malaysia [1987] 2 CLJ 263 (refd)
- i** *Soong Chee Kong v. Public Prosecutor and Ng Soon Sum & Anor. v. Public Prosecutor* [1951] 17 MLJ 5 (cit)
Public Prosecutor v. Lee Wye Kheng [1978] 1 MLJ 38 (foll)
Kan Sik Fong v. Public Prosecutor [1961] 27 MLJ 163 (cit)

Syed Abdullah v. Public Prosecutor [1964] 30 MLJ 48 (cit) **a**
Aw Yock Beng v. Public Prosecutor [1947] 13 MLJ 121 (cit)
Cheng Kee Huat & Anor. v. Public Prosecutor [1948] 14 MLJ 53 (cit)

Legislation referred to:

Criminal Procedure Code, s. 158, 173(h)
Customs Act 1967 (Revised 1980), ss. 2, 114, 119, 127, 127(1), 128(4), 135(1), (d), (e), (g), **b**
Customs Enactment 1937, s. 106
Customs and Excise Act, 1952 (UK), s. 304(b)
Customs and Excise Management Act 1979, ss. 14, 170(2)(a)
Customs Ordinance 1952, ss. 115, 123
Evidence Act, s. 114(g)
Trades and Customs Enactment Johore, s. 39(1)(h) **c**

Other sources referred to:

Statute Law, Craies, 5th Edn., p. 12

For the appellant - Allaudeen Ismail; DPP
For the respondent - Lau Kok Guan; M/s. Lau Kok Guan & Partners **d**

JUDGMENT

Abdul Malik Ishak J:

A hearing under s. 128(4) of the Customs Act, 1967 (Revised 1980), Act 235 (Act) was conducted by summons before the learned Magistrate, Magistrate's Court, Johor Bahru and at the conclusion of that hearing, the learned Magistrate ordered the release of motorlorry JCK 7549 (motorlorry) and the trailer T/J 4009 (trailer) to the respondent. Being dissatisfied, the Public Prosecutor appealed. **e**

The facts in so far as they are relevant to this appeal are that on 10 December 1991 at about 5.30 p.m. the motorlorry and the trailer arrived at the import examination bay of the Johor Bahru customs from Singapore. The trailer was covered with canvas and when the customs officer ordered the canvas to be removed, two male Indians who were the driver and attendant of the motorlorry and the trailer respectively, refused to comply and, in fact, they conveniently left the scene. Before the Indian attendant left the scene he did say that the items in the trailer were as declared in exhibit (PI). Incidentally exhibit (PI) relates to a declaration of imported goods. Suspecting that something was amiss, the customs officer reported to his superior who then directed a 100% check which revealed the presence of 450 pieces of raw particle boards and this tallied with what was declared in exhibit (PI). Apart from that, the customs also recovered the following items (hereinafter referred to as the "goods"):

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- a** (1) 586 pieces of inner tubes.
(2) 80 pieces of sport rims.
(3) 10 pieces of sport rims with tyres.
- b** The respondent asserted that they were the owners of the motorlorry and the trailer and they were not interested in the 450 pieces of raw particle boards and the goods. The goods were sold at RM19,000 as reflected in the receipt (P13) while the 450 pieces of raw particle boards were returned to the importer (PI4). Pending the inquiry under s. 128 (4) of the Act, the motorlorry and the trailer were released to the lawyer (PI5) who acted on behalf of the
- c** respondent. From the appeal record at page 11 thereof, the learned Magistrate ordered the forfeiture of the goods at the behest of the respondent. Be that as it may, it is pertinent to point out that the 450 pieces of raw particle boards together with the goods were all put inside carton boxes as shown in photographs P2A, P2B and P2C. But the boxes containing the goods were
- d** placed in the front portion of the trailer, immediately behind the motorlorry itself.
- Abdul Hamid FJ (as he then was) in *Keng Soon Finance Bhd. v. Pegawai Kanan Kastam, Johore Bahru* [1981] 2 MLJ 249 especially at page 250 stated in erudite terms the duty of the presiding Magistrate in proceedings under s. 128 (4) of the Act. This was what his Lordship said:
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- It must be noted that in proceedings pursuant to s. 128 (4) of the Act, the function of the President or the Magistrate, as the case may be, is to examine the matter pertaining to the claim by the owner of the goods seized. In doing so he has to satisfy himself that firstly, an offence against the Act has been
- f** committed and secondly, either (a) the goods were the subject matter of the offence, or (b) where the claim relates to the conveyance, such conveyance was used in the commission of the offence.
- Now, even though the summons in support of the proceedings under s. 128(4) of the Act specifically refer to an offence under s. 135(1)(g) of the Act which
- g** was said to have been committed and no prosecution was instituted thereunder, yet the learned Magistrate did not address his mind as to whether an offence, on the available evidence, would arise under s. 135(1)(g) of the Act (foreign). A perusal of the grounds written by the learned Magistrate would clearly show this oversight. Section 135(1)(g) of the Act enacts as follows:
- h** 135(1) Whoever:
- (g) is in any way knowingly concerned in any fraudulent evasion or attempt at fraudulent evasion of any customs duty, or in evasion or attempt at evasion of any prohibition of import or export.
- i** Once an intention to defraud the government of duties or to evade any prohibition can be established by the prosecution an offence under s. 135(1)(g) of the Act is said to have been committed. "It is the duty of the prosecution

to prove that the defendant is concerned in any fraudulent evasion (per Thomas CJ in *Loh Chak Wan v. Public Prosecutor* [1939] 8 MLJ (FMSR) 84). The English Court of Appeal in the case of *R v. Green (Harry Rodney)* [1975] 3 All ER 1011 boldly held that goods which are prohibited do not cease to be prohibited on their being seized by the customs authority and the accused can be guilty of fraudulent evasion of prohibition on importation even if the prohibited goods imported by him have been substituted and he deals with these goods subsequently with the requisite fraudulent intention. In that case a crate arrived at Southampton on 6 August 1973 on board a ship addressed to a person in London. That crate was placed in a shed for unaccompanied luggage awaiting collection. The appellant and another man filled in the necessary forms required for customs clearance. Among the completed forms was a purported inventory in which it was stated that the crate contained a child's writing desk and similar terms. The forms were sent to forwarding agents for clearance. On 20 August 1973, the customs authorities, having received the forms, opened the crate which was found to contain a quantity of cannabis in hessian sacks. They removed the cannabis and filled the bags with peat and paper. On 6 September the crate was collected by a firm of removers who took it to their warehouse. From there it was collected by a haulier whose name had been supplied by the appellant to other persons engaged in the operation. On 4 September 1973, the appellant rented a garage in a false name. On 6 September 1973, the crate was delivered by the haulier to the garage where it was stored. The appellant was subsequently charged with being knowingly concerned in the fraudulent evasion of the prohibition on importation of cannabis, contrary to s. 304 of the Customs and Excise Act, 1952. The Judge directed the jury that if they found that the appellant had done any of the acts in question they should convict. The appellant was convicted and appealed, contending that the commission of any of the acts after the seizure of the cannabis on 20 August 1973 could not render him guilty of the offence charged which had by then become impossible to perform. Ormrod LJ, delivered the judgment of the Court of Appeal and his Lordship had this to say (page 1016 d to f):

The *actus reus* in this offence is being concerned in the evasion or the attempted evasion of a prohibition on the importation of the goods in question, not the successful evasion. All the necessary ingredients were proved or admitted: cannabis is a prohibited drug, it was imported in breach of the prohibition; so evasion was established. We accept Counsel for the Crown's argument that evasion is a continuing offence, that is that it did not cease when the cannabis was seized by the authorities. Once imported, the evasion of the prohibition continues until the goods cease to be prohibited goods or, possibly, are re-exported. The renting of the garage, knowing that it was to be used to store the cannabis, completes the offence under s. 304(b) of the Customs and Excise Act, 1952. The trial Judge's direction to the jury on this count therefore cannot be criticised.

- a* As to the meaning of “fraudulent” appearing in s. 135 (1)(g) of the Act, Bostock Hill J in *Mohamed Taiyob v. Public Prosecutor* [1947] 13 MLJ 101 applied the meaning to that word as propounded by Lord Herschell in *Derry v. Peek* [1889] 14 AC 337 in that for fraud to be proved it must be shown that a false representation has been made (1) knowingly, or (2) without
- b* belief in its truth, or (3) recklessly, careless whether it be true or false. Briefly, *Mohamed Taiyob (supra)* was a case under s. 39(1)(h) of the Trades and Customs Enactment Johore where the value of the textiles stated in the declaration form was lower than the value as assessed by the customs valuers. Fraudulent evasion was held not established because the value stated was only
- c* slightly lower but overall it was not very much below the true value considering that the market in textile was falling.

Lord Lane CJ, in *Attorney General’s Reference (No. 1 of 1981)* [1982] 2 All ER 417 explained that the concept of fraud may produce quite remarkable results. This was how his Lordship put it:

- d* If the view of the Judge in the present case on the meaning of the word ‘**fraudulent**’ is correct, it produces some quite remarkable results. Evasion may, and often does, commence before the customs control point is reached. Indeed, if goods are in transit, that point may never be reached. *R v. Borro and Abdullah* [1973] Crim LR 513 CA, is an example of that. Another example is to be found in
- e* *R v. Smith (Donald)* [1973] 2 All ER 1161 at 1167; [1973] QB 924 at 935. Willis J, delivering the judgment of the Court, said:

- f* It seems quite clear that the Act contemplates that goods can be imported before they are either landed from a ship or unloaded from an aircraft ... it is plain that goods entering the country by air are imported before they are unloaded, as are goods brought by sea before they are landed ... It is sufficient to say that in this case we have no doubt that the cannabis in question was imported when the aircraft bringing it landed at Heathrow, and was exported when it was placed on board the BOAC aircraft and that it is quite irrelevant to the question of importation that it remained between unloading and reloading in a customs area.

- g* The Court in that case was concerned with the Customs and Excise Act 1952, but the wording was similar to that of the 1979 Act.

- h* What had happened in *Smith’s* case was that packets containing cannabis addressed to a person in Bermuda were put on board an aircraft in Kenya which was bound for Heathrow Airport. At Heathrow the packets were unloaded and, without leaving the customs area, were put on board a second aircraft bound for Bermuda. The cannabis was discovered when the packets arrived in Bermuda. The defendant was charged with being knowingly concerned in the fraudulent evasion of the prohibition against the importation of cannabis. There was no possibility of deceit being practised on any customs officer. If deceit is a requirement, then in this
- i* sort of case there can never be a conviction under this subsection of the Act. This seems contrary to good sense. Moreover, if actual deceit of a

customs officer is required, then no one involved in the importation after the customs point has been passed could normally be convicted. But importation is a continuing offence, and consequently this interpretation might mean that the eventual recipients and others who may have been primarily responsible for the evasion might escape justice. **a**

It seems to us to be a misinterpretation of Parliament's intention, and a path to absurdity, to make guilt depend on whether a customs officer is met and deceived on the one hand, or simply intentionally avoided on the other. **b**

Now, the facts in *Attorney General's Reference (No. 1 of 1981)* were that the defendants unloaded a quantity of smuggled cannabis from a cargo vessel docked at a quayside in the early hours of the morning when there were normally no customs officials on duty. Unknown to the defendants, they were observed by customs officials keeping a special watch on the defendants and they were pursued and stopped when they hurriedly drove off with the cannabis. They were subsequently charged under s. 170(2)(a) of the Customs and Excise Management Act 1979 with being knowingly concerned in a fraudulent evasion of the prohibition on the importation of cannabis. The trial Judge ruled that for the evasion to be "fraudulent" it had to be shown that the accused had actually deceived or attempted to deceive the customs officials and there being no evidence as to this, they were acquitted. The Attorney General referred to the Court of Appeal for its opinion the true effect of the word. Lord Lane CJ, rightly held that fraudulent evasion is established if the prosecution proved fraudulent conduct in the sense of dishonest conduct deliberately intended to evade the prohibition or restriction with respect to, or the duty chargeable on the goods. His Lordship was of the view that there was no need to prove deceit on customs officials because in the material legislation that was under review there was no such reference. **c**

On the question of "proof" and the likely presumptions which can be invoked for proceedings under s. 128 (4) of the Act, his Lordship Abdul Hamid FJ, in *Keng Soon Finance Bhd. (supra)* had this to say: **d**

As regards proof it is for the Court to consider the whole of the matter including, *inter alia*, the goods found in the conveyance, the nature of such goods, whether dutiable or otherwise, and all the circumstances surrounding the particular case. The Court may for purposes of such consideration invoke any presumption of law provided under the Act as and when it is applicable. As for example, by reason of s. 128(5) of the Act, s. 119 of the Act shall apply in the determination of a matter pursuant to s. 128(4). **e**

Thus, when one applies s. 119 of the Act, "the burden of proof thereof shall lie on the defendant (respondent)". It is for the respondent to show to the Court that: **f**

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- a* (1) customs duties have been paid in regard to the goods, or
(2) whether the goods have been lawfully imported, or
(3) whether the goods are exempt from duty under s. 14 of the Act.
- b* It is a correct appraisal of the evidence for me to say that the respondent had failed to discharge the burden of proof that had been shifted to them under s. 119 of the Act.
- c* In *Public Prosecutor v. Chieng Ung Kai* [1993] 1 MLJ 21 the facts were that customs officers, acting on information received, conducted a raid at a place and saw four persons in the process of unloading goods from a lorry to a store. On approaching, the four people fled from the scene. A quantity of beer and cigarettes was discovered in the lorry and the store. The goods were seized by the customs officers on suspicion of nonpayment of duty. Subsequently, the respondent turned up at the scene and admitted to the ownership of the goods seized. The respondent was then charged in the
- d* Magistrate's Court under s. 135(1)(e) of the Customs Act 1967 for being knowingly concerned in conveying uncustomed goods with intent to defraud the government of any duties thereon. He was, however, acquitted and discharged by the Magistrate at the conclusion of the prosecution's case without his defence being called on the ground that the charge could not stand. The
- e* prosecution filed an appeal in the High Court on the grounds, *inter alia*, that the learned Magistrate had erred in not amending the charge to one under s. 135(1)(d) of the Customs Act 1967, as was required of him by ss. 158 and 173(h) of the Criminal Procedure Code. Section 135(1)(d) of the Customs Act 1967 provides, *inter alia*, that whoever is knowingly in possession of any
- f* uncustomed goods is guilty of an offence. The prosecution based their argument on the evidence of a prosecution witness who stated that while at the scene, in answer to his question, the respondent had admitted that the goods belonged to him. On the question of uncustomed goods, the prosecution relied on s. 119 of the Customs Act 1967 to put the burden on the respondent to prove that
- g* the goods were not uncustomed goods. Abdul Kadir Suleiman J dismissed the appeal as he felt that a charge under s. 135(1)(d) would not be appropriate as at the time the respondent admitted to the ownership of the goods, he had already parted with the possession of the goods. At that time the goods were already seized and put under the control of the customs. His Lordship further
- h* refused to accede to the view as proposed by the prosecution that s. 119 of the Customs Act 1967 could be used to shift the burden to the respondent to show that the goods were not uncustomed goods. In view of the definition of "uncustomed goods" in s. 2 of the Customs Act 1967, that is, "goods in respect of which a breach of the provisions of this Act or of any subsidiary legislation made thereunder has been committed", his Lordship was of the view that the
- i* prosecution had to first show that there was such before s. 119 of the Customs Act 1967 could apply. His Lordship was further of the view that the fact that

the respondent could not show proof of payment of duty could not be used to show that the goods were uncustomed. **a**

The view of Abdul Kadir Suleiman J in *Public Prosecutor v. Chieng Ung Kai (supra)* was not followed by Steve Shim J in *Lau Kieng Chung v. Public Prosecutor* [1993] 3 MLJ 295. The appellant in *Lau Kieng Chung's* case **b** *(supra)* was charged and convicted under s. 135(1)(e) of the Customs Act, 1967 and was fined RM50,000 in default six month's imprisonment. The appellant appealed against both conviction and sentence on the grounds, *inter alia*, that (1) the Magistrate was wrong in holding that the goods were uncustomed goods; (2) the Magistrate failed to consider whether the appellant had discharged the onus that he had no knowledge that the goods were uncustomed goods; and (3) the Magistrate had erred in finding that there was intention by the appellant to defraud the government. His Lordship Steve Shim J, set out the ingredients necessary to sustain a charge under s. 135(1)(e) of the Customs Act 1967, namely: (a) that the accused person was knowingly concerned in conveying uncustomed goods; and (b) that in doing so, he had intended to defraud the government. In order to establish the first ingredient, his Lordship felt that it was necessary to prove; firstly, that there was a conveyance of the goods by the accused person; secondly, at the time of such conveyance, the goods were uncustomed goods; and thirdly, the accused person knew that the goods he conveyed were uncustomed goods. In order to establish that the goods were uncustomed at the time of the conveying, his Lordship felt that the prosecution was entitled to invoke s. 119 of the Customs Act 1967 to shift the burden of proof onto the accused if there was dispute as to whether duties had been paid in respect of the goods. Section 19 of the Customs Act, 1967 did not raise any presumption, it merely shifted the burden of proving the matters specified therein to the accused. **c**
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Way back in 1970, the then Federal Court in *Ng Eng Kooi & Anor. v. Public Prosecutor* [1970] 1 MLJ 267 FC (Azmi LP, Suffian and Gill FJJ) ruled that under s. 115 of the Customs Ordinance 1952 (the present s. 119 of the Act) the fact that the rice, the subject matter of the offence, had not been lawfully imported was presumed unless the contrary was proved, although the section did not say so in many words. **g**

It is not out of place to mention that s. 119 of the Act was enacted and by its very existence a statutory recognition was given to the possible difficulties faced by the Customs in discharging their duties under the Act. If the legislature thought it fit to retain s. 119 in the Act, then it is the function of this Court to give effect to it. As Parke B aptly pointed out in *Rusell v. Ledsam* [1845] 14 N. & W. 574, 589, 153 ER 604, 610 that: **h**

the province of the legislature is not to construe, but to enact; and their opinion, not expressed in the form of law as a declaratory provision would be, is not binding on Courts, whose duty is to expound the statutes they (the legislature) have enacted. **i**

- a* In the Introductory Chapter in a book by Craise on *Statute Law*, 5th edition, the following illuminating passage appears at page 12:

- b* It would be no easy task to ascertain at what period and by what means the Courts of law obtained the right of being the sole expositors of the statutes of the realm. In the early ages of the English system it appears that the line between the Judiciary and the legislature was not distinctly marked. Originally the House of Lords and Commons sat together, and the Courts of law were clearly subordinate to the Parliament. A writ of error lay from them to the Parliament, and they were accustomed even to consult Parliament before they decided points of difficulty and importance. But it is now one of the axioms of our law that it is not only the 'right' but also the duty of the judiciary to expound and interpret doubtful provisions of our legislative enactments.
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Reverting back to the question of an intent to defraud, Adams J, in *Lim Kim Chai v. Public Prosecutor* [1963] 29 MLJ 26 had this to say:

- d* Raja Azlan Shah who appeared for the Public Prosecutor conceded that the prosecution had to prove the intent to defraud, but argued that intent could be presumed from the evidence (see the judgment of Lord Justice Denning in *Welham v. Director of Public Prosecutions* 44 Cr. App. R. 124). In this submission the learned legal adviser is also correct. He argued that here the accused, who must be presumed to know what is dutiable and what is not, must have intended to defraud the Government. He said that any person who goes through the Customs gate with dutiable goods and does not declare them must, on the normal basis of the standards of the 'reasonable man', intend to evade the payment of duty, and that in itself is evidence of the necessary intention to defraud. He conceded that the learned President had not considered the question of the intention to defraud, but argued that there was abundant evidence on the record which established such an intent.
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In another part of his judgment in the same case, Adams J, boldly said:

- g* I would say at the outset that in my opinion any person who brings goods into the Federation without declaring them or producing them to the customs does so at his own peril. It is the act of a prudent man to enquire, if he is in any doubt, from customs whether or not a specific article carries duty. If he does not do this, then he cannot complain if the prosecution asks the Court to presume that in not doing so he intended to defraud the Government. Therefore if a person is found, as was the accused in this case, in the Federation conveying goods which carried duty and the duty on the goods he was carrying had not been paid, he cannot complain if at the end of the case for the prosecution he is called upon to make his defence to the charge that he conveyed such uncustomed goods knowingly and with intent to defraud the Government.
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- i* Applying the principles of law as discussed above, it is my judgment that the learned Magistrate in an apparent oversight failed to take into account the existence of fraud on the available evidence. I have given careful consideration to the submissions of both parties before me and found that there was an abundant material for me to hold that there was indeed fraud perpetrated by the two Indians. For convenience, it can, be summarised as follows:

- (1) both the two Indians refused to open the canvas that covered the trailer when ordered by the customs officer; **a**
- (2) the Indian attendant stated that the trailer contained items as reflected in exhibit (PI), but, on examination other goods were found;
- (3) both the two Indians disappeared from the scene and subsequently warrants were issued for their arrests (exhibit P8); **b**
- (4) in the absence of the two Indians, the customs officer “mengesyaki sesuatu barang cuba diseludupkan di dalam motorlori tersebut”;
- (5) PWI testified that for the last 17 years as a customs officer never before had there been a refusal to remove the canvas from the trailer by a lorry driver when commanded to do so by him; **c**
- (6) PWI testified that usually lorry drivers would immediately open the canvas to the lorry/trailer when ordered by him; and
- (7) the motorlorry with the trailer had just arrived from Singapore. **d**

All these are elements of fraud be a gross miscarriage of justice to hold otherwise. As Abdul Hamid FJ (as he then was) said in *Keng Soon Finance Bhd. (supra)*:

On an enquiry pursuant to s. 128 (4) of the Act, the Court shall examine all the evidence produced before it including that which may be tendered by the claimant in order to satisfy itself there is such proof. The Court is competent in determining the matter before it to draw inferences from the facts proved. **e**

It was ingeniously argued that once the motorlorry and the trailer had arrived at the customs bay import check point, the customs were only concerned with the “goods” carried in the vehicle and itself. The learned Magistrate was particularly impressed with this submission and he set these out in his grounds of judgment but, with respect, the learned Magistrate failed to take into account the evidence of PW6 under re-examination when he said in strong terms that: **f**

Kastam hanya berminat terhadap barang semasa barang itu di import. Sekiranya ada satu kesalahan di bawah Akta Kastam yang melibatkan lori kastam juga berminat terhadap lori itu. **g**

It is evidently clear from the evidence of PW6 that since those goods were found after a 100% examination the customs became interested in the motorlorry and the trailer. A vain attempt was made to impress upon me that the process of conveying the 450 pieces of raw particle boards and the goods came to an abrupt stop when the motorlorry and the trailer became stationary at the customs import bay. I fail to understand this submission. It really boggles the mind to think that being stationary would put an end to conveying. The fact that the motorlorry and the trailer were stationary when they were at the import bay would not by itself interrupt the process of conveying the 450 **h**

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- a* pieces of raw particle boards and the goods from Singapore to Johor Bahru (see a similar approach by Spenser Wilkinson J, in *Yap Yoon Lin v. Regina* [1954] 20 MLJ 59 especially at page 61). Moreover, the word “goods” as defined in s. 2(1) of the Act “includes animals, birds, fish, plants and all kinds of moveable property” and on the authority of *Reg v. Ng Hee Weng & Ors.* [1956] 22 MLJ 85 as applied in *Keng Soon Finance Berhad (supra)* it would
- b* “include a conveyance of any kind in any circumstances.” To borrow the words of Abdul Hamid FJ (as he then was) in *Keng Soon Finance Berhad (supra)*:

The law is clear in that “goods” referred to in that section refers to goods seized pursuant to s. 114 of the Act and which evidently includes receptacles, packages conveyances, etc.

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- A point was advanced that the prosecution failed to call the two Indians and one Yeo Lai Meng to the stand and their absence have cut the umbilical cord of the prosecution’s case, so to speak. There is no merit in this argument.
- d* Warrants for the arrest of these two Indians had been issued (P8) and their names were boldly printed therein in complete reliance to the passports left by them in the motorlorry in their haste to depart from the scene (see exhibits P6A, P6B and P6C). Before the learned Magistrate (see page 28 of the appeal record), the prosecution informed the Court that the subpoena for Yeo Lai Meng had been served and, in view of his absence, the prosecution promptly
- e* applied for a warrant for his arrest. The learned Magistrate had acceded to the prosecution’s request and, accordingly, issued a warrant for the arrest of Yeo Lai Meng. *Omnia praesumuntur contra spoliatorem* - if a man wrongfully withholds evidence, every presumption to his disadvantage consistent with the facts admitted or proved will be adopted. Adverse inference can only
- f* be drawn if there is withholding of evidence and not merely on account of failure to obtain evidence. Here, clearly the prosecution did not withhold the names of these two Indians nor that of Yeo Lai Meng. How could the presumption under s. 114(g) of the Evidence Act be triggered off in favour of the respondent? As a claimant, the respondent was not restrained to tender
- g* evidence to show that the goods fall within those categories as set out earlier in this judgment, namely, that they fall within the scope of s. 119 of the Act. No evidence was forthcoming from the respondent.

- It seems to me that the respondent was pushing the blame to the two Indians. The respondent says that as owners of the motorlorry and the trailer they were
- h* not responsible for the acts of the two Indians and what those two Indians did should not tie them down criminally. The short answer is provided in *Reg v. Ng Hee Weng & Ors. (supra)* where notwithstanding that the motorcar that was used in the commission of the offence was a hired car, it was held that it did not preclude the Court in forfeiting it. The headnote reads as follows:
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Where a vehicle used in the commission of an offence had been seized by a customs officer under s. 110 of the Customs Ordinance 1952 (the present s. 114 of the Customs Act 1967), and if it is proved to the satisfaction of the Court

that the vehicle had been so used, s. 123 of the said Ordinance (the present s. 127 of the Customs Act 1967) gave no discretion to the Court, but render an order for forfeiture mandatory. a

In *Sinjo Credit & Leasing Sdn. Bhd. v. Minister of Finance Malaysia* [1987] 2 CLJ 263 where there was a application for leave to apply for an order of *certiorari* to quash the order made by the Minister of Finance dated 28 July 1985 when the applicant's appeal under s. 129 of the Customs Act 1967 for the return of the applicant's motor vehicle JBB 2833 was rejected by the respondent Shankar J. (now JCA) said: b

The mere fact that the owner of a vehicle was innocent of the offence for the commission of which the vehicle was used, does not entitle him as a matter of right to have an order from the Minister for the return of his vehicle to him. c

Likewise here, the innocence of the respondent will not entitle them to the return of the motorlorry and the trailer. This Court strictly construes s. 127(1) of the Act against the respondent. d

It is my judgment, after considering the available evidence, that an offence against the Act has been committed. The goods were the subject matter of an offence under s. 135(1)(g) of the Act and the motorlorry together with the trailer were used in the commission of such offence and, consequently, it is mandatory to forfeit both the motorlorry and the trailer. e

It is germane to state that under the old s. 106 of the then Customs Enactment, 1937, the trial Court was given a wide discretion as reflected in *Soong Chee Kong v. Public Prosecutor* and *Ng Soon Sum and Anor. v. Public Prosecutor* [1951] 17 MLJ 5 to decide whether or not to forfeit even if the goods were involved in smuggling and it was for this reason that Taylor J, was prompted to say that forfeiture was not only unjust but unduly harsh. But under the present s. 127(1) of the Act, forfeiture is made mandatory so long as "the goods were the subject matter of or were used in the commission of the offence." See the related cases on the subject matter: *Public Prosecutor v. Lee Wye Kheng* [1978] 1 MLJ 38; *Kan Sik Fong v. Public Prosecutor* [1961] 27 MLJ 163; *Syed Abdullah v. Public Prosecutor* [1964] 30 MLJ 48; *Aw Yock Beng v. Public Prosecutor* [1947] 13 MLJ 121 and *Cheng Kee Huat and Anor. v. Public Prosecutor* [1948] 14 MLJ 53. The words "notwithstanding that no person may have been convicted of such offence" appearing in s. 127(1) of the Act make it inevitable that forfeiture cannot be avoided even if the accused was acquitted of the charge against him provided the trial Court is satisfied that "the goods were the subject matter of or were used in the commission of the offence." As Syed Agil Barakbah J. (as he then was) said in *Public Prosecutor v. Lee Wye Kheng (supra)*: f
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a With regard to the cross-appeal by the respondent against the order of forfeiture of the exhibits, I am in agreement with the learned President. The exhibits have been proved to be prohibited goods and found in the possession of the respondent. The trial Court was satisfied that an offence against the Act has been committed, i.e. the gold coins were imported by person or persons unknown without licence. The respondent was acquitted on the ground that he had no knowledge that they were prohibited. The exhibits were the subject matter of the offence. They still remain prohibited goods. They were liable to forfeiture and ought to be forfeited even though the respondent was not convicted of the offence charged. I am of the opinion that the provision of s. 127 of the Customs Act applies on all fours.

c It goes without saying that the appeal by the Public Prosecutor succeeds.

Reported by Gan Peng Chiang

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